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No. 85-1690

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

GOODYEAR FARMS, an Arizona corporation; LITCHFIELD PARK PROPERTIES, an Arizona corporation; and LITCHFIELD PARK SERVICE COMPANY, an Arizona corporation

Appellants,

v.

THE CITY OF AVONDALE, a municipal corporation,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

APPELLANTS' REPLY IN OPPOSITION TO APPELLEE'S AND INTERVENOR'S MOTIONS TO DISMISS OR AFFIRM

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Appellants hereby oppose the Motions to Dismiss or Affirm filed by appellee and the intervenor State of Arizona. The appeal presents substantial federal questions. The Appellants meet the case or controversy requirements of Article III and, therefore, have standing to raise their constitutional challenge.

ARGUMENT

I. THE CASE PRESENTS SUBSTANTIAL FEDERAL QUESTIONS

1. Appellee erroneously suggests that appellants are asking this Court to hold that there is a constitutional right to vote in an annexation proceeding.[1] (M.D. 4) That is not appellants' position. The Arizona statute grants certain individuals the right to participate in a political process in a manner that will, in and of itself, determine the municipal body and laws that will govern everyone in the area to be annexed — not only those who participate in the petitioning process, but those residents who are not allowed to participate. It is appellants' position that under the requirements of Arizona's annexation statute, petitioning for annexation is a right just as fundamental as the right to vote, and that the constitutional guarantee of equal protection applies to the right to petition just as strongly. The difference between placing a slip of paper in a ballot box and signing one's name on such a petition cannot be constitutionally significant, rendering equal protection principles applicable in one case and not in the other.

Unlike the cases cited by appellee to support its position,[2] the Arizona legislature has granted to citizens the exclusive right to select and determine the laws and representatives

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[1] Appellee's citation to *Hunter v. Pittsburgh*, 207 U.S. 161 (1907) and *Adams v. City of Colorado Springs*, 308 F.Supp. 1397 (D. Colo. 1970) (M.D. 5) are therefore inapplicable. Hunter was not an equal protection case, did not discuss the property-owner/non-property owner classification, and did not deal with a statute similar to Arizona's.

[2] Motion to Dismiss, p. 6 n. 4.

that will govern the area to be annexed. It is not "sheer bootstrapping" (M.D. 6) to argue that this fundamentally important political right is entitled to strict scrutiny.

Appellee argues that no decision has expanded the right to vote to a situation where no election is held (M.D. 7). But appellants do not ask the Court to create a right where none was created by the legislature. In Arizona, the legislature itself has granted to some citizens, unequally, the exclusive right to "vote" for the laws and lawmakers who will represent them once the annexation is complete, and has thus "expanded" the equal protection guarantee to the petitioning process. In a very real sense, the state has granted a voting right but has improperly attempted to restrict it (M.D. 7). Appellee, like the Arizona Supreme Court, missed the "bright line principle" that once the right has been granted, the equal protection guarantees apply (M.D. 7).

Contrary to appellee's suggestion (M.D. 4, 6 n. 5), the decision below does conflict with other state cases. In *Curtis v. Board of Supervisors,* 104 Cal. Rptr. 297, 501 P.2d 537 (1972), the California Supreme Court held unconstitutional a statute allowing owners of 51% of the property value of the area to be incorporated to veto, by petition, the formation of a new city. The same result was reached in *Levinsohn v. City of San Rafael,* 40 Cal.App.3d 656, 115 Cal. Rptr. 309 (1974), *Hayward v. Clay,* 573 F.2d 187 (4th Cir. 1978) and *Town of Fond du Lac v. City of Fond du Lac,* 22 Wis.2d 533, 126 N.W.2d 201 (1964), to name a few. Although each of those cases provided for an election somewhere in the procedure, none of the challenged participatory procedures was an election. *Curtis, Levinsohn* and *Fond du Lac* involved petitioning. *Hayward* involved a referendum. The important point of the cases, however, is that all of them condemned weighted property-owning based classifications in situations virtually identical to the one at bar. It is clear, moreover, that had those courts been called upon to evaluate Arizona's annexation statute, each would have found the statute unconstitutional because there is no compelling state interest

or rational basis to uphold classifications based upon property ownership.

2. The property-owning classification created by the statute cannot survive even minimal scrutiny under the Equal Protection Clause. Appellee's argument that including all electors in the process "would 'severely hamper' the annexation process and impair urban development" (M.D. 8) is simply unsupported and unpersuasive. Moreover, *Adams v. City of Colorado Springs*, 308 F.Supp. 1397 (1970), which leaned upon this justification, is not applicable. In that case, "all persons residing within the territory to be annexed are treated equally with respect to the right to exercise the franchise." *Id.* at 1403. Here, persons in the area to be annexed are not treated equally. Other cases previously cited, such as *Curtis*, specifically reject any notion that there is any rational basis whatsoever for an exclusionary and weighted "voting" scheme that is keyed to property ownership.

Appellants in no way "concede," nor have they ever conceded, that there is any rational basis whatsoever for the statute's classifications (M.D. 8). Merely acknowledging that there is good reason for allowing citizens to participate in the petitioning process is not conceding, "in effect" or otherwise, that there is any reason for excluding some citizens, and diluting the voice of others, from a fundamentally important political process.

The federal questions raised by appellants will not have only a limited and isolated impact. To the contrary, appellee itself concedes that the statute's recent amendment does not affect the issues involved herein. Appellants themselves are aware of at least three additional cases currently pending in the Arizona courts that seek to decide the very issues raised before this Court. The questions presented are ones that will recur and at least in part will haunt the new statute.

II. APPELLANTS MEET THE STANDING REQUIREMENTS OF ARTICLE III.

The State intervenor contests appellants' standing to raise their important constitutional claims. In order to have

standing, appellants need only demonstrate a "distinct and palpable injury" that can fairly be traced to the challenged conduct, so that the exercise of federal power will redress their injury. *Warth v. Seldin*, 442 U.S. 490, 501 (1975); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 261 (1977). Appellants meet these requirements.

First, annexation will subject appellants involuntarily to the laws and ordinances of the City of Avondale, the charges and taxes for municipal services, and the general control, authority and jurisdiction of the City. This is a "distinct and palpable injury," that satisfies the Article III "case or controversy" requirement.

Second, appellants are denied, by the operation of the statute, their constitutional rights to gather support against annexation from others in the area to be annexed who are disenfranchised or whose vote is diluted, to associate with them for the advancement of their political beliefs, and to therefore participate effectively in this fundamentally important political process. Those who may desire to defeat annexation must obtain enough support so that the signatures on the petition will be insufficient to initiate annexation under the statute. One such person's vote against annexation is meaningless absent his ability to pool his vote with those votes of others who also desire to defeat annexation. The statute in this case infringes upon appelants' own First Amendment rights, and upon those of other similarly situated residents.

Third, by conditioning the success of the petition to annex upon the value of the property in the area to be annexed, the annexation statute denies an equal participation to owners of property in the area to be annexed. Their "vote" is unconstitutionally weighted by the disparate values of their property.

Appellants' injury can also fairly be traced to the challenged conduct, so that the exercise of federal power will redress their injury. Striking down the wealth and property-

owning classification of the annexation statute will allow appellants the opportunity to participate meaningfully by having an equal participation with other property owners and by having the opportunity to join with other non-property owning residents who desire to defeat annexation to advance their collective political beliefs. See, *Williams v. Rhodes*, 393 U.S. 23 (1968) (right to associate for advancement of political beliefs and right to cast vote effectively are overlapping fundamental rights). Appellants need not prove that they will succeed in defeating the annexation in order to show that this injury will be redressed. Loss of the opportunity to participate meaningfully is injury sufficient to give appellants standing, even though the benefit that would have been realized had the opportunity been accorded is uncertain. *Watt v. Energy Action Educational Foundation*, 454 U.S. 151 (1981). Whether victory on the merits would result in the defeat of the annexation is a matter of "relief," not standing. *University of California v. Bakke*, 438 U.S. 265, 280 n.14 (1978). Appellants have standing to raise the issues presented.

Finally, this Court's "prudential rule of self-restraint," *Craig v. Boren*, 429 U.S. 190 (1976), should not preclude appellants from asserting the associational and equal protection rights of the disenfranchised non-property owners. Appellants, as advocates of the rights to associate to advance collective political beliefs and to effectively and meaningfully participate in the process of selecting one's governing body, have the necessary interest and adversarial involvement to bring the issues into sharp focus. Appellants and the disenfranchised non-property owners have been denied the right to associate together; neither have an equal or meaningful opportunity to participate in the petitioning process. Their interests are clearly aligned. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

CONCLUSION

Appellants have standing and raise substantial federal questions that merit this Court's plenary review; appellants therefore respectfully request the Court to deny appellee's and the State intervenor's Motions to Dismiss or Affirm.

RESPECTFULLY SUBMITTED,

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